Yugoslav war crimes tribunal hears important preliminary motions

IX. LAW OF WAR

A. Yugoslav War Crimes Tribunal Hears Important Preliminary Motions

By André Klip

On June 23, 1995, Prof. Michail Wladimiroff and Mr. Milan Vujin, counsel for the accused, filed three motions. A motion on the principle of *ne bis in idem*, a motion on the lack of jurisdiction of the tribunal and a motion on the form of the indictment. The prosecutors (Mr. Grant Niemann, Mr. Michail Keegan and Mr. William Fenrick) responded on July 7, 1995. This article describes the arguments of both the Defense and the Prosecutor. The Trial Chamber (Judges McDonald presiding, Stephen and Vohrah) will hear additional oral arguments on July 25, 26, and 27, 1995.

The motions of the Defense find their legal basis in Rule 73 of the Rules of Procedure and Evidence of the Tribunal. All three of these preliminary motions touch upon the very existence and legitimacy of the Tribunal. They are of great importance not only for the *Tadic* case but for any other case the Tribunal might have to try in the future. If the Tribunal were to accept only one of the motions it would almost certainly lead to dismissal of all charges. The rulings of the Tribunal on these motions will represent the general framework on both the jurisdiction of the Tribunal and on the cooperation with the Tribunal.

1. Motion on the Principle of Ne Bis In Idem

The Defense takes the position that Tadic is subjected to two prosecutions. The first started in Germany and the second takes place before the Tribunal. This contravenes the principle of *ne bis in idem* which protects an accused from being prosecuted twice for the same offense. According to the Defense, the transfer of the *Tadic* case from Germany to the Tribunal constitutes a transfer of criminal proceedings. Analogizing to the provisions of the European Convention on Transfer of Proceedings, a transfer takes place before a court becomes involved in the case. By doing so the transferring state transfers its entire right to prosecute to another state (or tribunal). Should the state already have initiated its prosecution, the Tribunal cannot prosecute since, in that case, two states would have the right to prosecute.

The Defense draws further support from the fact that the Prosecutor issued a new indictment on the same facts as the German *Staatsanwaltschaft*. According to the Defense, the Tribunal applied the concurrent jurisdiction rule of article 9 paragraph 2 of the Statute in breach of the *ne bis in idem* rule of article 10 paragraph 2. This last article provides for two situations in which the *ne bis in idem* rule does not apply. The present case however does not amount to one of these situations.

The Prosecution submits that the doctrine of *non bis in idem* is not applicable in this case. The Prosecution respectfully requests the Trial Chamber to dismiss the Defense "Motion on the Principle of *Ne Bis In Idem*" of June 23,1995. The Prosecution states that the Defense ignores the character of the *ne bis in idem* rule prevents the retrial or punishment of a person already subject to a final judgment on the merits for the same offense. Since the accused in the present case was not subject to a final judgment on the merits in Germany, the *ne bis in idem* rule is not applicable. The use of the terms "defer" and "deferral" in the Statute, Tribunal Rules and the Germany ICTY Law is meant to make a difference to the transfer of proceedings.

2. Motion on the Jurisdiction of the Tribunal

The Defense stated that the establishment of the Tribunal is legally unfounded (e.g., it should have been

entered into by convention and instead was established by U.N. Security Council action) and the establishment of its jurisdiction as well as its primacy over domestic courts constitutes an infringement upon the sovereignty of the states directly affected.

The Tribunal has no jurisdiction *ratione materiae* to try any crimes under articles 2-5 of the Statute. These articles fail to determine or describe the offenses in such a way that they can serve as an acceptable basis of substantive law to be referred to in the provisions regarding jurisdiction.

In the eyes of the Defense any jurisdiction exercised by an International Tribunal and its establishment can only be based on a treaty. If a treaty is not required to properly establish the authority of the Tribunal, the only competent organ would be the UN General Assembly.

The implementation of the Statute of the Tribunal by adoption of the Security Council without any further adhesion of the General Assembly is not founded on chapter VII of the Chapter. The establishment of the Tribunal is not a measure within the scope of this chapter, because the conflict between the Serbs and the Muslims within the borders of Bosnia-Herzegovina is clearly not an international issue. Article 41 of the Charter of the UN does not provide for the establishment of a tribunal either.

The defense contends the suggestion that the determination of powers in connection with article 39 of the Charter is within the exclusive domain of the Security Council. It is clear that in the process of the continuing expansion of its powers there must come a point at which the Security Council would lose its legitimacy. In the opinion of the Defense it is states , not individuals, who are the actors on the international stage and can pose threats to the international peace and security, not individuals.

The ill foundation of the competence of the Tribunal to prosecute violations of humanitarian law in the territory of the former Yugoslavia, leads to a situation in which those accused will be denied the right to be tried by their national courts according to their national law. The State of Bosnia-Herzegovina is competent and willing to prosecute.

Articles 2-5 of the Statute did not create substantive law and only describe the subject matter jurisdiction of the Tribunal. The scope of the criminal acts to which articles 2-5 refer defines the jurisdiction *ratione materiae* of the Tribunal. The Tribunal does not have jurisdiction on grave breaches of the Geneva Conventions of 1949.

The Tribunal does not have jurisdiction under article 3 of the Statute as far as this provision deals with violations of the laws and customs of war committed in a situation that is not an international armed conflict between two or more contracting Parties to the 1907 Hague convention and its regulations.

The Prosecutor presented an impressive response and requested the Defense motion to be denied. The Prosecution stated the establishment of the ICTY was within the powers of the Security Council. The establishment of the ICTY was a valid measure under Chapter VII of the Charter. The ICTY has established primary jurisdiction to try this case and all cases alleging violations within the subject matter jurisdiction of the ICTY Statute. The ICTY has established the power to prosecute the accused under Article 2 of the Statute on the grounds that at all relevant times the requirements for the applicability of the Grave Breaches provisions of the 1949 Geneva Conventions were satisfied. The ICTY has established the power to prosecute the accused under Article 3 of the Statute for Committing Violations of the Laws or Customs of War in an armed conflict, whether international or internal in character. The ICTY has established the power to prosecute under Article 5 of the ICTY Statute insofar as crimes against humanity do not require a nexus with an armed conflict, whether international or internal in character.

3. Motion on the Form of the Indictment

The Defense stated that the accused had not been charged in a precise statement of the place, time and manner of execution of the alleged crimes, nor by a sufficient description of his conduct in connection with the specific elements constituting a crime as meant under article 2-5 of the Statute.

The Defense also complained about multiple qualifications of each prosecuted behavior which are not consequently indicted as alternatives or subsidiars to each other. This would result in a cumulation of different qualified crimes resulting from the same alleged behavior.

The Prosecution submitted that the indictment fully complies with the requirement of Article 18(4) of the Statute of the Tribunal (Statute) and Rule 47(B) of the Tribunal Rules, and through that compliance, it provides the accused with sufficient notice of the nature of the crimes with which he is charged and the facts which support those charges. The fact that the indictment provides the accused sufficient notice of the nature and cause of the charges is reflected by the statements of Defense counsel at the initial appearance before the Tribunal that the accused has read a copy of the indictment in his own language and understood the charges. The accused then entered a plea by stating, "I never took part in any of the crimes with which I am charged." Further, the Prosecution submitted that there is no unreasonable multiplication of charges in the indictment.

In the eyes of the Prosecution, the indictment does not contain an unreasonable multiplication of charges. Rule 49 of the Tribunal Rules allows for the joinder of two or more crimes in an indictment "if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused." An inherent corollary to the rule that a series of related acts committed by the accused can be joined in a single indictment is that when a single act committed by the accused violates multiple criminal provisions, those multiple charges may also be brought in a single indictment. The prosecution refers to a principle well recognized in national criminal codes. The determining factor appears to be the intent of the legislature in drafting the penal provisions. If the legislature intended the crimes to be separate acts, then separate convictions can stand even though based on the same conduct. Those same jurisdictions generally hold that the court will then impose one sentence for all the acts that can not exceed the total penalty the acts could have subjected the accused to in the aggregate.

B. Budgetary Crisis Jeopardizes Operation of the International Criminal Tribunal for the Former Yugoslavia

By Victoria Gotsch[*]

The International Criminal Tribunal for the Former Yugoslavia has moved into a critical stage. As it has become opeational, it has indicted Bosnian Serb leader Rodovan Karadzic and his top military commander, Ratko Mladic,[1] but yet was mired in a financial crisis.[2]

---

[*] Victoria Gotsch is the assistant editor to the INTERNATIONAL ENFORCEMENT LAW REPORTER and is a legal assistant at Cameron & Hombostel in Washington, D.C. She graduated in May 1994 with a Bachelor of Arts degree in Political Science from Loyola University of Chicago.

[1] *See* William Drozdiak, *Top Serbs Charged with War Crimes*, WASH. POST, July 26, 1995, at A1, col. 1.

[2] An analysis of these indictments and other developments will be discussed in future issues.